No. 77-192

In the Supreme Court of the United States

OCTOBER TERM, 1977

PAULINE A. STEBBINS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The court of appeals affirmed without opinion (Pet. App. 21).

JURISDICTION

The judgment of the court of appeals was entered on June 24, 1977. The petition for a writ of certiorari was filed on July 23, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court erred in permitting government agents to testify at trial, although the agents had destroyed their rough interview notes and draft

memoranda of interviews with petitioner after the notes and memoranda had been incorporated into final reports that were turned over to the defense prior to trial.

STATEMENT

Following a jury trial in the United States District Court for the District of Vermont, petitioner was convicted of making a false declaration to a grand jury, in violation of 18 U.S.C. 1623. She was sentenced to one year's imprisonment, all but one month of which was suspended in favor of two years' probation, and was fined $2,500. The court of appeals affirmed without opinion (Pet. App. 21).

The evidence showed that in May 1975 a federal grand jury commenced an investigation into the illegal drug activities of William Stebbins, petitioner's son, and the payment of a large sum of money through Frank Fucci, an attorney, to an elected state official in Vermont in connection with an aggravated assault case that had been brought against the son (Tr. 32-36).[1] Petitioner appeared before the grand jury on October 4, 1975. After being advised of her rights, petitioner falsely stated that she had not paid, transferred, or transmitted $10,000 to Fucci for her son's legal fees on May 22, 1973 (Tr. 74, 82). This claim was disputed by Fucci, who testified at trial that he had represented William Stebbins in his aggravated assault case and, as payment for his services, had received $10,000 from petitioner on May 22, 1973, the day on which her son pleaded guilty to a reduced charge (Tr. 136, 139-140, 147-149).

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[1]On December 27, 1972, William Stebbins was charged in Vermont state court with aggravated assault. Although Stebbins fled the State to avoid arrest, petitioner retained Fucci to represent him. After some negotiations between Fucci and the State's Attorney, the charge was reduced to a misdemeanor (Tr. 143-145). Stebbins then returned to Vermont and pleaded *nolo contendere* (Tr. 143, 510). Allegedly, a payment was made to a state official to obtain the reduced charge.

ARGUMENT

Petitioner contends that the district court erred in permitting four government agents to testify at trial, because the agents had destroyed their rough interview notes and other memoranda of pretrial interviews with petitioner after those notes and memoranda had been incorporated in the agents' final reports. This claim is insubstantial.

1. On September 18, 1973, Agents Edward Burke and Ronald DeCoigne of the Internal Revenue Service interviewed petitioner and her son in connection with an investigation of petitioner's son's income tax liability (Tr. 10, 94-97, 116). Agent Burke took notes "[g]enerally paraphrasing what was stated," but without recording the entire discussion (Tr. 10, 97). These notes were neither shown to nor adopted by petitioner (Tr. 97). Shortly after the interview, Agent Burke, assisted by Agent DeCoigne, drafted an outline of his notes and dictated a final memorandum based on the outline (Tr. 98, 103-104). After the so-called "memorandum of contact" was typed in final form, both agents reviewed it by comparing the typed memorandum against the outline and the original rough interview notes (Tr. 10-11, 98-99). Agent Burke made any necessary changes in the memorandum, paying particular attention to the dates and amounts of money mentioned, and then destroyed the rough notes (Tr. 98-99). The agents "agreed that the contents [of the final memorandum] correctly reflected" their discussion with petitioner (Tr. 11).

On January 7, 1976, Agents Albert Axton and John Hess of the Federal Bureau of Investigation interviewed petitioner for about 15 minutes (Tr. 2-3, 116-117). Neither agent took any notes during the interview (Tr. 3, 117). The next day Agent Axton typed "the substance of what

was said" on F.B.I. Form 302 and, after Agent Hess had reviewed the form, sent the rough draft to Albany, New York, to be re-typed (Tr. 117-121). Both agents later proofread the final form by comparing it with the rough draft. After finding it correct, they initialed the final form and destroyed the rough draft (Tr. 3, 7-8, 118-119, 122).

2. Relying on *United States* v. *Harrison*, 524 F. 2d 421 (C.A. D.C.) and *United States* v. *Harris*, 543 F. 2d 1247 (C.A. 9), petitioner argues that since the agents' destruction of their rough interview notes and draft memoranda precluded the district court from determining whether these materials were discoverable under Rule 16, Fed. R. Crim. P., the Jencks Act (18 U.S.C. 3500), or *Brady* v. *Maryland*, 373 U.S. 83, the agents should not have been allowed to testify at trial. We have recently discussed the question of the producibility of the rough interview notes of government agents in our brief in opposition in *Mehta* v. *United States*, No. 77-8.[2] As we noted in that brief, although the courts of appeals have taken divergent views on the routine destruction of rough interview notes, this issue is of little continuing importance because the F.B.I. and the I.R.S. have recently changed their internal procedures to require retention of the rough interview notes of their agents.[3] There is, in addition, no reason for further review of this

[2]We are serving petitioner with a copy of our brief in *Mehta*.

[3]Although petitioner complains of the destruction of Agent Axton's typed draft Form 302, nothing in *Harrison* or *Harris* required retention of that draft, as opposed to the rough notes from which the draft was compiled. In *Harrison*, for example, the court held only that the F.B.I. agents' rough interview notes, and not their "dictated report" of the interview, should have been preserved (see 524 F. 2d at 424).

case because "no substantial rights of [petitioner] have been affected by the destruction of the rough notes * * *." *United States* v. *Harris, supra*, 543 F. 2d at 1253.[4]

Prior to trial, petitioner was provided with the final Form 302 prepared by the F.B.I. agents as well as the memorandum of contact prepared by the I.R.S. agents (Tr. 129-130). Hence, she received "the substance of [her] oral statement[s]" to government agents, as required by Fed. R. Crim. P. 16(a)(1)(A). Furthermore, petitioner's due process claim is unpersuasive, since it is far from apparent how the original notes of her own statements to government agents could have constituted *Brady* material.

Finally, there is nothing to petitioner's speculative contention that she was prejudiced by the destruction of the rough interview notes because the jury would not have believed Fucci's testimony without the corroboration provided by the testimony of the government agents, which, according to petitioner, should have been excluded under the Jencks Act (18 U.S.C. 3500(d)).[5] As noted

[4]We are unaware of any case in which the good faith destruction of rough interview notes in accordance with standard agency practice has led to the reversal of a conviction. See, *e.g.*, *United States* v. *Robinson*, 546 F. 2d 309, 312 (C.A. 9), certiorari denied *sub nom. Chew* v. *United States*, 430 U.S. 918.

[5]Although Fucci alone testified to the actual transfer of $10,000 on May 22, 1973, he stated that "there [was] no question in [his] mind" that petitioner had given him the money (Tr. 141-142). The F.B.I. agents corroborated this statement by testifying that petitioner admitted to them that she had given the money to Fucci, but that she contended that the money was a gift to her son from another person and tried to distinguish "given" from "paid" (Tr. 290-291, 317-319).

While it is true that Fucci's trial testimony was inconsistent to some extent with his previous statements to government agents (see Pet. 10-11), at no time did he ever claim that he received the money from anyone other than petitioner. Fucci's inconsistencies related to such peripheral matters as whether prior arrangements had been made for payment of the fee, whether petitioner's son was present at the time of

above, neither *Harris* nor *Harrison* required the exclusion of the testimony of the F.B.I. agents, since they did not destroy their rough interview notes. Thus, petitioner's suggested sanction applied only to I.R.S. Agent Burke, who (as petitioner concedes (Pet. 16-17)) did not testify about any specific reference by petitioner to the $10,000 payment to Fucci. Indeed, any incriminating statements attributed to petitioner by Agent Burke (*e.g.*, that petitioner had provided her son with spending money, had posted bail for him, and *would* pay his legal fees) were also related by Agent DeCoigne, who had been present at the interview but had not taken any notes (Tr. 327-329, 336, 347-348).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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payment, at what particular time of day on May 22, 1973, he delivered one-half of the fee to another attorney whom he had retained in the event that the matter went to trial, and whether the State's Attorney or his deputy had amended the complaint in the assault case in open court. The jury was fully aware of these inconsistencies (primarily through the efforts of government counsel (see Tr. 150-170, 291-293, 357-358)), but it nevertheless chose to believe Fucci's testimony that petitioner had paid him the money.